No. 82-1213

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1982

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

BENJAMIN QUARLES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Questions Presented

1. Whether the Court of Appeals of the State of New York properly excluded the defendant's statement, "The gun is over there," as being elicited in violation of his federal constitutional rights where the police had probable cause to believe that he had just committed an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket.

2. Assuming, *arguendo*, that question one is to be answered in the affirmative, whether the Court of Appeals of the State of New York properly excluded the defendant's gun, which was recovered from a carton a few feet from the defendant, as a fruit of the constitutional violation.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of Facts	2
Introduction	2
The Evidence	3
The Decision on the Hearing	4
The Appeal to the Appellate Division	4
The Appeal to the New York Court of Appeals	5
Reasons for Granting the Writ	5
Introduction	5
Point One—The decision rests solely upon the Constitution of the United States	7
Point Two—The court below improperly held that *Miranda* v. *Arizona*, 384 U.S. 436 (1966) requires pre-interrogation warnings before the questioning of a suspect regarding the location of a gun where the police have probable cause to believe that he had just commited an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket	8

PAGE

Point Three—The court below improperly assumed that physical evidence obtained derivatively from a *Miranda* violation must always be suppressed 9

Point Four—The court below erred in suppressing the defendant's gun because it would inevitably have been discovered even absent the defendant's statement 11

Conclusion 12

Appendix

Order of the Supreme Court of the State of New York 1a

Memorandum Opinion of the Supreme Court, Queens County 2a

Memorandum Opinion of the Court of Appeals, State of New York 6a

TABLE OF AUTHORITIES

PAGE

Cases:

Adams v. Williams, 407 U.S. 133 (1972) 9

Jankovich v. Toll Road Commission, 379 U.S. 487 (1965) 7

Michigan v. Tucker, 417 U.S. 433 (1974) 6, 7, 10
Mincey v. Arizona, 437 U.S. 389 (1978) 9
Miranda v. Arizona, 384 U.S. 436 (1966) 2, 4, 5, 6, 7, 8, 9, 10

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 9

Ohio v. Gallagher, 425 U.S. 257 (1976) 7
Orozco v. Texas, 394 U.S. 324 (1969) 10

People v. Brown, 266 N.E. 2d 13 (App. Ct. Ill. 1st Dist. 1970) 11
People v. Dean, 114 Cal. Rptr. 555 (Cal. Ct. of App. 4th Dist. 1979) 9
People v. Fitzpatrick, 32 N.Y. 2d 499 (1973) *cert. denied*, 414 U.S. 1033 11
People v. Riddle, 148 Cal. Rptr. 170 (Cal. Ct. of App. 2d Dist. 1978) *cert. denied*, 440 U.S. 937 (1979) 9
Pope v. State, 478 P.2d 801 (S.C. Alaska, 1977) 9

Schmerber v. California, 384 U.S. 757 (1966) 9
State v. Lane, 467 P.2d 304 (S.C. Wash. 1970) 9

Terry v. Ohio, 391 U.S. 1 (1968) 9

United States ex rel. Owen v. Twomey, 508 F.2d 858 (7th Cir. 1974) 11
United States v. Falley, 489 F.2d 33 (2d Cir. 1973) 11

Warden v. Hayden, 387 U.S. 294 (1967) 9

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Opinion Below

The opinion of the Court of Appeals of the State of New York, not yet reported, appears in the appendix hereto (pp. 6a-14a).

Jurisdiction

The decision of the Court of Appeals of the State of New York was entered on November 18, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

Constitutional Provisions Involved

FIFTH AMENDMENT

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

FOURTEENTH AMENDMENT

Section 1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Statement of Facts

Introduction

Acting upon apparently reliable information given to him by a woman who claimed to have been raped at gunpoint, a police officer found a man, the defendant, who precisely fitted this victim's description, at the precise place designated by her, namely a supermarket. Apprehending the defendant, who was carrying an empty shoulder holster, after chasing him through the store, the officer (without giving any *Miranda* warnings) asked him where the gun was. The defendant indicated a carton a few feet away, and the officer there recovered a loaded revolver. As a result, the defendant was indicted for criminal possession of a weapon in the third degree.

Upon a motion to suppress both evidence of the defendant's statement about the revolver's location and the gun itself, a hearing was held upon both phases of the motion.

The motion was granted in all respects by an order suppressing both the gun and the declaration, accompanied by an opinion.

Upon an appeal by the People to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, that order was affirmed without opinion On appeal, by leave to the Court of Appeals of the State of New York, the order of the Appellate Division, Second Judicial Department, was affirmed by a 4 to 3 decision.

The Evidence

On September 11, 1980, Police Officer **Frank Kraft** and his partner, Officer **Sal Scarring**, were in uniform and driving their patrol car eastbound on 47th Avenue and Francis Lewis Boulevard when they were approached by a young woman who stated that she had just been raped at gunpoint and asked for their assistance. She described the rapist as a black man, approximately six feet tall, wearing a short black jacket with "Big Ben" in yellow letters on the back, and declared that he had gone into the A & P store on Francis Lewis Boulevard.

Kraft drove the woman to the front of the store, which was about a quarter of a block north of the point where he had stopped. As Officer Scarring called for assistance, Kraft went to the front of the store. There, he saw the defendant, who matched the description given by the woman, approaching the checkout counter.

Upon Kraft's appearance in the doorway, the defendant fled from the checkout counter to the rear of the store.

Kraft gave chase, lost sight of the defendant for 15 or 20 seconds, caught up to him, and told him to stop and put his hands over his head. As other police officers were arriving on the scene, Kraft frisked the defendant, discovering an empty shoulder holster, then handcuffed his hands behind his back and asked him where the gun was. The defendant looked in the direction of a carton approximately four feet away and said, "the gun is over there." Kraft searched in the carton and found a loaded revolver—the subject of the *Mapp* phase of this motion. He then informed the defendant that he was under arrest, read the *Miranda* warnings to him and asked him if he owned the gun, to which the defendant replied in the affirmative. Kraft then asked where he had purchased the gun and the defendant said, "Miami, Florida."

The Decision on the Hearing

By order dated April 3, 1981, the hearing court granted the defendant's motion to suppress statements and physical evidence. In a memorandum decision accompanying the order, the hearing court stated that the defendant was "entitled to the *Miranda* warnings before any questioning as the police had reasonable cause to arrest and the officers' safety was not in question." A copy of the hearing court's order and memorandum decision is annexed hereto (pp. (1a-5a).

The Appeal to the Appellate Division

Upon appeal to the Appellate Division of State Supreme Court, Second Judicial Department, the People contended that the single question, "where is the gun" did not constitute interrogation under *Miranda* v. *Arizona*, 384 U.S. 436

(1968) because it was a prudent protective measure attendant to the defendant's arrest and custody and that, even were the declaration of the defendant regarding the location of the gun to be deemed improperly obtained, the gun itself need not have been suppressed because it would inevitably have been discovered, even absent the statement. However, the Appellate Division unanimously affirmed the hearing court's order without opinion.

The Appeal to the New York Court of Appeals

On appeal, by leave, to the New York Court of Appeals, the People raised the same arguments as had been presented to the Appellate Division. By a 4 to 3 vote, the Court of Appeals affirmed the order of the Appellate Division. In a memorandum decision, the majority reasoned that the "defendant's response to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled" and rejected the minority's contention that there was a "sufficiently compelling noninvestigatory purpose" for the question which obviated the necessity for *Miranda* warnings. The full texts of the majority and dissenting opinion appear in the appendix hereto (pp. 6a-14a).

Reasons for Granting the Writ

Introduction

The petitioner argues the following reasons why this petition for writ of *certiorari* should be granted:

1. The decision of the New York Court of Appeals rests solely upon the Constitution of the United States.

2. The issue of whether exigent circumstances can justify the questioning of a person in custody without the benefit of *Miranda* warnings is an extremely substantial federal question which this Court has never decided. While the New York Court of Appeals expressly declined to rule on this question, we submit that its adverse determination of the subsidiary question of whether the likely presence of a gun in a building open to the public such as a supermarket, within a few feet of a defendant who the police have probable cause to believe had just committed an armed felony, constitutes an exigency raises, in itself, a substantial federal question which the Court should determine.

3. The extent to which a violation of *Miranda* requires the exclusion of physical evidence obtained derivatively from a defendant's statement is also a very substantial federal question which has never been decided by this Court. We submit that the position of the New York Court of Appeals on this isue conflicts with the spirit of *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

4. The question of whether physical evidence which would inevitably have been discovered even absent a *Miranda* violation need be suppressed as a fruit of that violation is a third substantial federal issue which has not been decided by this Court.

POINT ONE

The decision rests solely upon the Constitution of the United States.

There are no valid, independent state grounds for the decision reached by the New York Court of Appeals. Therefore, the doctrine expressed in *Jankovich* v. *Toll Road Commission*, 379 U.S. 487 (1965) is not applicable. Further, there is no need to remand this case to the New York Court of Appeals for clarification of its opinion. [*Ohio* v. *Gallagher*, 425 U.S. 257 (1976).] The holding of the New York Court of Appeals that the defendant's statement was elicited without the benefit of "pre-interrogation warnings to which he was constitutionally entitled" was a clear reference to *Miranda* v. *Arizona*, *supra*, and the Fifth Amendment to the United States Constitution. While the People submit that the holding that the *Miranda* warnings are constitutionally required conflicts with *Michigan* v. *Tucker*, *supra*, there can be no doubt that the New York Court of Appeals was basing its decision solely on its interpretation of the Fifth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment.

POINT TWO

The court below improperly held that *Miranda* v. *Arizona*, 384 U.S. 436 (1966) requires pre-interrogation warnings before the questioning of a suspect regarding the location of a gun where the police have probable cause to believe that he had just committed an armed felony and disposed of the gun in the immediate vicinity of where he was standing in a supermarket.

The evidence at the suppression hearing established that Police Officer Kraft had reason to believe that the defendant had committed an armed felony shortly before he encountered him, that the defendant fled upon seeing the officer, that the latter lost sight of him for 15 or 20 seconds, and that, when he finally caught him and frisked him, he found an empty shoulder holster. Under these circumstances, Kraft reasonably believed that there was a gun in the supermarket within a close range of himself, his fellow officers, and the public. To require him to provide *Miranda* warnings to the defendant before asking "where is the gun?" would clearly subject him to unnecessary risk in the performance of his duties. This question was a prudent measure to neutralize the threat of physical harm to anyone in the vicinity which could result from the discovery of the gun by a friend of the defendant, a curious child, or anyone else who, for any reason, might decide to use it. Police should not be discouraged from taking such measures by requiring them to administer *Miranda* warnings before doing so.

This Court has never decided whether exigent circumstances can justify the police in asking a question of a

person in their custody without providing *Miranda* warnings. The Court has made it abundantly clear, however, that exigencies of various sorts can justify the police in conducting searches without a warrant. [See, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Schmerber* v. *California*, 384 U.S. 757 (1966) (destruction of evidence); *Terry* v. *Ohio*, 391 U.S. 7 (1968); *Adams* v. *Williams*, 407 U.S. 133 (1972); *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977) (danger).] In *Mincey* v. *Arizona*, 437 U.S. 389, 393 (1978), the Court stated that "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." There is no reason why this general rule should not apply equally to asserted violations of the Fifth Amendment as to asserted violations of the Fourth Amendment. The courts of several states have already explicitly done so [*e.g.*, *People* v. *Riddle*, 148 Cal. Rptr. 170 (Cal. Ct. of App. 2d Dist. 1978) *cert. denied* 440 U.S. 937 (1979); *People* v. *Dean*, 114 Cal. Rptr. 555 (Cal. Ct. of App. 4th Dist. 1974); *Pope* v. *State*, 478 P.2d 801 (S.C. Alaska, 1977); *State* v. *Lane*, 467 P.2d 304 (S.C. Wash. 1970)]. The People submit that this Court should also explicitly deal with the issue.

POINT THREE

The court below improperly assumed that physical evidence obtained derivatively from a *Miranda* violation must always be suppressed.

The court below assumed that its finding that there had been a *Miranda* violation required the exclusion of the defendant's gun from evidence. The People submit that the court was incorrect in this assumption.

This Court has never determined the extent to which a *Miranda* violation requires the suppression of physical evidence obtained derivatively therefrom. In *Orozco* v. *Texas*, 394 U.S. 324 (1969), the Court suppressed a statement regarding the location of a gun but made no comment regarding the suppression of the gun itself. In subsequent cases, however, the Court has indicated a willingness to permit the use of evidence derivatively obtained from a *Miranda* violation under certain circumstances. Thus, in *Michigan* v. *Tucker*, *supra*, the Court refused to suppress the testimony of a witness who was discovered because of a statement taken in violation of *Miranda*. [See, also, *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 724 (1975).] *Tucker* explicitly distinguished between a violation of the Fifth Amendment privilege against self-incrimination and a violation of the prophylactic measures suggested in *Miranda* to secure that privilege (417 U.S. at 444), a distinction which the court below failed to recognize. Further, the Court in *Tucker* stated that where the official action which constituted a violation was planned in complete good faith, rather than willfully or negligently, the deterrent rationale of the exclusionary rule loses much of its force (*id.*, at 447).

In the case at bar, there can be no doubt about the good faith of Officer Kraft. Immediately after securing the gun, the officer gave the defendant his *Miranda* warnings. Further, the very fact that 3 out of the 7 judges on the highest court in our state believed that the evidence submitted at the hearing was sufficient to establish a compelling state purpose in securing the gun is an indication that, even if it be determined that Kraft acted improperly, he did not do

so willfully or negligently. Under the circumstances, therefore, the deterrent value of excluding the gun from evidence is far outweighed by the societal cost of letting the defendant go free. [See, *United States* v. *Calandra*, 414 U.S. 338 (1974).]

POINT FOUR

The court below erred in suppressing the defendant's gun because it would inevitably have been discovered even absent the defendant's statement.

Because Officer Kraft knew with a high degree of certainty that the defendant's gun was within the immediate vicinity of the encounter, he undoubtedly would have searched for it in the carton a few feet away from the defendant without the defendant having pointed it out. Accordingly, the People argued, both at the Appellate Division and at the Court of Appeals, that even if, *arguendo*, the suppression of the initial statement be deemed correct, the recovery of the gun was proper under the doctrine of "inevitable discovery."

While this Court recognized the existence of the doctrine of inevitable discovery in *United States* v. *Crews*, 445 U.S. 463, 471 (1980), it has never commented on the validity of it. The validity of the doctrine has, however, been accepted in a number of state courts as well as federal circuit courts. [*People* v. *Fitzpatrick*, 32 N.Y.2d 499 (1973), *cert. denied* 414 U.S. 1033; *People* v. *Brown*, 266 N.E.2d 13 (App. Ct., Ill., 1st Dist. 1970); *United States ex rel. Owen* v. *Twomey*, 508 F.2d 858 (7th Cir. 1974); *United States* v. *Falley*,

489 F.2d 33 (2d Cir. 1973).] The People submit that this Court should clarify the validity of the doctrine and that it should be applied to the case at bar.

Conclusion

For the reasons stated above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

JOHN J. SANTUCCI
District Attorney
Queens County

STEVEN J. RAPPAPORT
Assistant District Attorney
Of Counsel

82-1213

APPENDIX

Order of the Supreme Court of the State of New York

SUPREME COURT—STATE OF NEW YORK

CRIMINAL TERM, PART 9, QUEENS COUNTY

88-11 Sutphin Boulevard, Jamaica, N. Y.

Present:

HON. NICHOLAS FERRARO, J.S.C.
Justice

Ind. No. 2512/80

Motion: Suppress Statements and Physical Evidence
Hearing March 6, 1981

THE PEOPLE OF THE STATE OF NEW YORK

against

BENJAMIN QUARLES,

Defendant.

HYMAN & MINER, ESQS.
For the Motion
JOHN WALLENSTEIN, A.D.A.
Opposed

The following papers numbered 1 to 3 submitted in this motion

	Papers Numbered
Answering and Reply Affidavits	1–3
Minutes of hearing	3

Upon the foregoing papers THIS MOTION IS GRANTED. SEE MEMORANDUM ON FILE.

GRANTED:

Dated: April 3, 1981

/s/ JOHN J. DURANTE

/s/ N F

Hon. Nicholas Ferraro, J.S.C.

Memorandum Opinion of the Supreme Court, Queens County

SUPREME COURT—QUEENS COUNTY

CRIMINAL TERM, PART 9

By

NICHOLAS FERRARO J.S.C.

Dated: April 13, 1981

Indictment No. 2512/80

THE PEOPLE OF THE STATE OF NEW YORK,

vs.

BENJAMIN QUARLES,

Defendant.

The defendant, Benjamin Quarles, moves for an order; (1) to suppress certain statements allegedly made by him in violation of his constitutional rights pursuant to CPL section 710.20 (3); (2) to suppress certain physical evidence allegedly seized from him as a result of an unconstitutional search and seizure pursuant to CPL section 710.20(1).

A combination physical evidence suppression (*Mapp*) and *Huntley* hearing was held on March 6, 1981 and the court found the following:

On September 11, 1980 at approximately 12:30 A.M. Police Officer Frank Kraft was the operator of a marked

police car. He and his partner, Officer Sal Scarring, were eastbound on 47th Avenue at Francis Lewis Boulevard when a young woman ran over to the car and asked for assistance. She stated that she had been raped and that the man that did it was a male black, approximately six feet tall wearing a short black jacket with "Big Ben" in yellow letters on the back had gone into an A & P Store on Francis Lewis Boulevard. She also stated the man had a gun. The women [*sic*] was put in the police car and driven near the A & P. Officer Scarring called for back up units as Officer Kraft stood in the doorway of the store and saw the defendant walk toward a check out counter and place groceries on it. The defendant then turned and ran up the aisle toward the back of the store with Officer Kraft in pursuit. Officer Kraft lost sight of the defendant as the defendant turned at the end of the aisle but saw him seconds later two aisles away and told him to stop and put his hands over his head. At that time other police officers surrounded the defendant and Officer Kraft went over to the defendant and frisked him and discovered an empty shoulder holster. Kraft then handcuffed the defendant's hands behind his back. Kraft then asked the defendant where the gun was. The defendant looked in the direction of a stack of cartons and said 'the gun is over there" The gun was not in sight but Kraft reached into a liquid soap carton and found a loaded revolver. He placed the defendant under arrest and read the the proper *Miranda* warnings to him. He then asked the defendant if he owned the gun. The defendant replied "yes" and to the further question of where the gun was bought the defendant responded "Miami, Florida".

The Court after a complete review of the credible evidence finds that the gun and the statement "the gun is over there" must be suppressed.

At the time the defendant was apprehended at least four officers were around the defendant with drawn guns. After the defendant was searched the police handcuffed his hands behind his back. There can be no doubt the defendant was in custody or arrested within the meaning of *Miranda* vs *Arizona*, (86 S. Ct. 1602).

As stated in People v Shivers, (21 NY2d 118)

> "However, once the officer draws his gun, the individual interoggated [*sic*] is actually deprived of his freedom and under *Miranda*, he may no longer be questioned without first being warned of his rights, and any statement elicited without such warnings may not be received in evidence, or otherwise used, at a subsequent trial".

Later cases have held a police officer may ask questions under the Stop and Frisk rule where justified by reasonable suspicion or to protect the officers [*sic*] safety (People v Chestnut 51 NY2d 14; People v Hoffman, 41 NY2d 29). Here the police by handcuffing the defendant had in effect arrested the defendant. He was now entitled to the *Miranda* warnings before any questioning as the police had reasonable cause to arrest and the officers [*sic*] safety was not in question.

The further question of whether to suppress the additional statements by the defendant that he owned the gun and bought it in Miami, Florida after the Miranda warnings were given is a much closer question of law.

Memorandum Opinion of the Supreme Court

The Court finds that the statements made by the defendant after he was given the *Miranda* warnings was [*sic*] tainted by the previous seizure of the weapon and the statement without the warnings. Once the defendant made a prior statement improperly elicited this let "the cat out of the bag" and affected his subsequent statement (United States ex rel Stephen J.B. v Shelly 430 F2d 215, 219). The later statements were made within a period of minutes after the finding of the gun while still in the store and can be called the fruit of the poisonous tree.

Memorandum Opinion of the Court of Appeals, State of New York

COURT OF APPEALS—STATE OF NEW YORK

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

2 No. 615

THE PEOPLE &C.,

Appellant,

v.

BENJAMIN QUARLES,

Respondent.

(615) John J. Santucci, DA, Queens County (Steven J. Rappaport of counsel) for appellant.

Steven J. Hyman & Wayne Brody, NY City, for respondent.

MEMORANDUM.

The order of the Appellate Division should be affirmed.

It was only after defendant had been frisked and his hands handcuffed behind his back that, in consequence of the discovery of an empty shoulder holster, Officer Kraft asked him where the gun was. Pointing to a liquid soap carton several feet away, defendant replied, "The gun is over there." At the time defendant was surrounded by four

police officers whose guns had been returned to their holsters because, as Officer Kraft testified, "the situation was under control". Nothing suggests that any of the officers was by that time concerned for his own physical safety.

Inasmuch as defendant's response to the police interrogation occurred while he was in custody, before he had been given the pre-interrogation warnings to which he was constitutionally entitled, the courts below properly suppressed defendant's statement and the gun which officer Kraft had found on reaching into the liquid soap carton to which defendant had pointed. Similarly, the statements made by defendant only minutes later after he had been given his pre-interrogation warnings were properly suppressed as having been tainted by the seizure of the gun and defendant's pre-warning statement as to its location.

Even if it be assumed that an emergency exception to the normal rule might be recognized if the purpose of the police inquiry had been to locate and to confiscate the gun for the protection of the public as distinguished from their desire to obtain evidence of criminal activity on the part of defendant—a proposition as to which it is not necessary in this case to express an opinion—there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern. Nor, so far as appears from the record, was any such theory advanced by the People at the suppression hearing. Undeniably neither of the courts below, with fact-finding jurisdiction, made any factual determination that the police acted in the interest of public safety.

The two cases on which the dissent would rely are inapposite. In *People v Huffman* (41 NY2d 29) the question was put to the defendant while the police were engaged in a general investigation of possible criminal activity but before they were aware that any crime had been committed and was framed as a threshold inquiry seeking general information only ("What are you doing back here?") rather than calculated to elicit evidence of criminal activity ("Where is the gun?"). In *People v Chestnut* (51 NY2d 14, cert den 449 US 1018) where the defendant's challenge was based primarily on his constitutional right to be free from unreasonable search and seizure under the Fourth Amendment of the Federal Constitution rather than his constitutional right to pre-interrogation warnings, although the defendant and his companion were lying prone on the ground and the officers were standing over them with their guns drawn, the defendant had not been reduced to a condition of physical powerlessness as here, i.e., the situation was not yet "under control", and the police question was found to have been prompted by the officers' concern for their personal safety. We noted that the absence of any constitutionally mandated pre-interrogation warnings did not call for suppression inasmuch as there was no custodial interrogation.

Memorandum Opinion of the Court of Appeals

WACHTLER, J. (dissenting):

In my view, under the circumstances, the police responded to an emergency situation in an entirely reasonable manner and, therefore, suppression of the weapon and defendant's statements cannot be justified on the ground that he was subjected to "custodial interrogation" in violation of his *Miranda* rights.

On September 11, 1980 at approximately 12:30 a.m. Officer Frank Kraft and his partner, Officer Sal Scarring, were on road patrol on 47th Avenue at Francis Lewis Boulevard, Queens, when a young woman approached and requested assistance. She stated that she had just been raped by a man she described as a black male, approximately six feet tall wearing a black jacket with the name "Big Ben" in yellow letters on the back. She indicated that her assailant had entered the nearby A&P supermarket on Francis Lewis Boulevard, and that he had a gun.

The officers drove the woman to the supermarket where Kraft approached the front of the store on foot while Scarring radioed for assistance. Kraft then observed the defendant, who matched the description given by the woman, approaching the checkout counter. Defendant then fled to the rear of the store with Kraft, who lost sight of the defendant for several seconds, in pursuit. Kraft told defendant to stop and put his hands over his head. Other officers who had arrived in the interim surrounded defendant while Kraft frisked him, discovering an empty shoulder holster.

Kraft handcuffed defendant's hands behind his back and asked him where the gun was. The defendant looked in the

direction of a stack of cartons and responded "the gun is over there". The gun was not visible but Kraft reached into one of the cartons and retrieved a loaded revolver. He placed defendant under arrest and advised him of his *Miranda* rights. Kraft then asked defendant if he owned the revolver and received an affirmative reply. In response to another question posed by Kraft defendant indicated that he purchased the weapon in Miami, Florida.

Criminal Term suppressed the statement "the gun is over there" because defendant had not yet been informed of his *Miranda* rights, and also suppressed the revolver and post-arrest statements as tainted evidence (*Wong Sun v United States*, 371 US 471). The Appellate Division affirmed without opinion. In my view neither the letter nor the spirit of the Supreme Court's decision in *Miranda v Arizona* (384 US 436) was violated under these circumstances, and, accordingly, I dissent and vote to reverse.

In *Miranda v Arizona* (384 US 471, *supra*) the Supreme Court held that statements obtained as the result of a custodial interrogation of a defendant may not be used at trial absent some demonstration that procedural safeguards were employed to secure the defendant's privilege against self-incrimination. The court recently interpreted the meaning of the term "interrogation", as used in this context, as including not only express questioning but also its functional equivalent, defined as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect" (*Rhode Island v Innis*, 446 US 291, 301).

Memorandum Opinion of the Court of Appeals

Careful analysis of the *Miranda* and *Innis* decisions suggests that the court is primarily concerned with discouraging official conduct which, examined objectively, reveals an unmistakably deliberate attempt to elicit some incriminating response from the detainee as opposed to official conduct designed to achieve an articulable and legitimate noninvestigatory purpose. Neither the Supreme Court nor this Court has ever ruled that a response to a question properly classifiable in the latter category should be suppressed as the product of a custodial "interrogation" in violation of *Miranda's* admonition.

In *People v Huffman* (41 NY2d 29) we held, after determining that defendant was clearly in custody, that the question "what are you doing back there?" directed at a suspect discovered hiding in some shrubbery behind a store at 4 a.m. did not constitute "interrogation" within the meaning of *Miranda*. We determined that the question "was designed to clarify the nature of the situation confronted, rather than to coerce a statement . . . [the officers] had found themselves, quite inadvertently, in the middle of a possible criminal transaction and immediate clarification was necessary before taking drastic action" (41 NY2d, *supra* at p 34).

In *People v Chestnut* (51 NY2d 14) we addressed a factual situation remarkably similar to the instant case. An officer in pursuit of two robbery suspects, at least one of whom was believed armed, observed one pass a small object to the other. After the suspects were apprehended and, while they were lying on the ground with the officer's revolver trained on them, the recipient of the object was asked

"where is the gun?" Citing *Huffman*, we specifically held that none of defendant's Fifth Amendment rights were violated notwithstanding that no *Miranda* warnings were given before the question was posed. We expressed our "opinion that this single question did not constitute custodial interrogation and, thus, the response given by defendant—'It's right here'—need not be suppressed even though defendant was not informed of his constitutional rights before answering" (51 NY2d, supra, at p 23 n 8 [citation omitted]). Since there could be no doubt, after *Huffman*, that defendant was in custody (although not under arrest) the clear import of our holding was that the question was not, under the circumstances, the equivalent of "interrogation" within the meaning of *Miranda*.

Although the officer in *Chestnut* indicated that he believed himself to be in physical danger when he asked the suspect for the weapon, the factual finding by the courts below in this case that the officer's safety was never in question does not require a contrary result. Initially, it is worth noting that nothing in our opinion in *Chestnut* either explicitly or implicitly suggested that our determination that the question was not prescribed [*sic*] by *Miranda* (as opposed to our holding that the question was not an improper stop and frisk under the Fourth Amendment) was based on the officer's perceived threat of physical danger.

More significantly, the danger posed to the general public in this case due to the officers' inability to locate a loaded weapon—a threat which many would perceive to be even more insidious than the threat to the officer's life in *Chestnut*—certainly provides a sufficiently compelling non-investigatory purpose for questioning defendant about the

gun's location without first warning defendant of his *Miranda* rights.[1] Approaching the situation with foresight, as Officer Kraft would have, it is evident that the loaded weapon here could have been passed to a cohort, an accomplice bent on securing the freedom of his captured ally, or, worse yet, dropped on the street outside the supermarket to become the weapon of an innocent child, a mentally unstable adult, or anyone else who might decide to use it. Faced with an obvious emergency requiring an immediate response, Officer Kraft, like the officers in *Huffman*, acted reasonably and, in my view, properly in questioning defendant in a limited manner "designed to clarify the nature of the situation confronted" (41 NY2d *supra*, at p 34).[2]

To require a police officer to provide *Miranda* warnings before asking about the location of a weapon under the circumstances of this case would only unnecessarily enhance the potential for death or severe injury. Far from reveal-

1. In an analogous factual context, the Fifth Circuit Court of Appeals, sitting *en banc*, expressed a similar view: "We find ourselves unable to condemn, after the fact and on grounds of some delicacy, such mild prohylactic measures reasonably calculated to ensure the safety of the officers, the suspect, and others on the scene as well. To be sure, the court below concluded that the agents did not feel physically threatened by Castellana, but in our view the mild measures adopted were justified by a reasonable prudence under the circumstances and did not require an actual fear of imminent harm to validate them" (*United States v Castellana*, 500 F2d 325, 326-327 [footnote omitted]).

2. Nor do we place any significance, as does the majority, in the fact that the police officer's question was not found by the suppression court to have been prompted by the officer's concern for his personal safety or the safety of others. Indeed this is not an appropriate standard to measure the reasonableness of a police officer's conduct in a situation such as this which was fraught with danger. This was our holding in *People v Moore*, (32 NY2d 67): "Then, too, we attach no significance to the fact that at the suppression hearing the arresting officer did not articulate any feeling of fear for his own safety or for the safety of others at the time of the search".

ing a deliberate design on the part of the officer to elicit an incriminating statement from defendant, the record before us portrays a prudent measure undertaken to neutralize the very real threat of possible physical harm which could result from a weapon being at large.[3] Nothing could be more appropriate here than our observant understatement in *Huffman* (41 NY2d, supra, at p 34) that "[t]his was no time for pre-interrogation warnings, or the tender of legal representation".

Miranda was never intended to enable a criminal defendant to thwart official attempts to protect the general public against an imminent, immediate and grave risk of serious physical harm reasonably perceived. Any result which discourages the police from pursuing this type of precautionary measure by requiring *Miranda* warnings beforehand, at the risk of losing the use of all evidence derived thereafter, is contrary to reason and binding precedent.

Accordingly, I respectfully dissent and vote to reverse.

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Order affirmed in a memorandum in which Chief Judge Cooke and Judges Jones, Fuchsberg and Meyer concur. Judge Wachtler dissents and votes to reverse in an opinion in which Judges Jasen and Gabrielli concur.

Decided November 18, 1982

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3. In view of the validity of the first question asked of defendant regarding the location of the gun and the admissibility of his answer, there is no longer a predicate to suppress the revolver. Seizure of the weapon violated no Fourth Amendment right of the accused. Likewise, all of defendant's post-arrest statements are properly admissible, for the questions which elicited those responses were prefaced by the administration of proper *Miranda* warnings.